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No. 98-535

In The

Supreme Court of the United States

October Term, 1998

TEXAS EDUCATION AGENCY,

Petitioner,

vs.

KAREN HANSEN MESSER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition does not contain "A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties). . ." as required by Sup. Ct. R. 14.1.(b). The caption of the case is styled as follows in the petition: "*Texas Education Agency, Petitioner v. Karen Hansen Messer, Respondent.*" The cover of the petition erroneously refers to it being filed by "Counsel for Respondent."

An accurate list of all parties to the proceeding in the Fifth Circuit is as follows: Karen Hansen Messer (Plaintiff-Appellant below and Respondent here) (hereafter referred to as "Respondent" or Messer"); Lionel R. Meno ("Meno"), in his former official capacity as the Texas Commissioner of Education; Mike Moses ("Moses"), in his official capacity as the Texas Commissioner of Education; and the Texas Education Agency (Defendants-Appellees below; only one of whom, the Texas Education Agency, is expressly named as Petitioner here). In this regard, there is confusion because the caption of the petition refers to "Texas Education Agency, Petitioner [singular]" whereas the petition states, at page 1, in pertinent part, "The Attorney General of Texas, on behalf of petitioners [plural] herein, the Texas Education Agency and an [unnamed] official of the Texas Education Agency, respectfully petitions for writ of certiorari. . . ."

Since they are not named in either the style or the body of the petition, Messer submits that Meno and Moses are not parties to the petition. Accordingly, the opinion and judgment of the Fifth Circuit is now final and nonappealable as to both Meno and Moses.

The only "petitioner" named in either the style or the body of the petition is former Defendant/Appellee Texas Education

Agency ("TEA"). Accordingly, Messer submits that the only "petitioner" before this Court is Petitioner TEA.

Messer shall hereafter refer to the petitioner (and/or the petitioners in the event this Court should deem Meno and/or Moses to be petitioners), whether singular or plural, as "Petitioner" or "TEA."

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STATEMENT OF THE CASE

The petition seeks this Court's review of the Fifth Circuit's opinion reported at *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997) and reproduced at Appendix A to the petition ("App. A"). The Fifth Circuit's opinion affirmed, in part, and reversed and remanded, in part, the opinion of the District Court reported at *Messer v. Meno*, 936 F. Supp. 1280 (W.D. Tex. 1996) and reproduced at Appendix C to the petition ("App. C"). The suggestion for rehearing *en banc* was treated as a petition for panel rehearing. The petition for panel rehearing and the suggestion for rehearing *en banc* was denied by the Fifth Circuit in its opinion rendered December 11, 1997. Appendix B to the petition ("App. B").

On July 6, 1998, the Fifth Circuit issued its mandate returning the case to the District Court for trial. On July 8, 1998, TEA filed its motion to recall the Fifth Circuit's mandate and to stay the mandate pending petition for certiorari. By order filed July 13, 1998, the Fifth Circuit denied TEA's motion to recall the mandate and to stay the mandate pending petition for certiorari.

This case is presently pending in the District Court. "Defendants' [TEA's] Motion to Stay Proceeding Pending Petition for Certiorari" was filed in the District Court on July 17, 1998. The District Court's "Scheduling Order and Trial Setting" was signed on July 27, 1998. By "Order" signed September 16, 1998, the District Court denied "Defendants' [TEA's] Motion to Stay Proceeding Pending Petition for Certiorari." On September 24, 1998, "Defendants' [TEA's] Motion to Reconsider Stay of Proceedings Pending Petition for Certiorari" was filed in the District Court. On October 14, 1998, the District Court signed its "Order" granting the stay requested by "Defendants' [TEA's] Motion to Reconsider Stay of Proceedings Pending Petition for Certiorari."

A. The petition misstates the status of this case (which, in accordance with the mandate of the Fifth Circuit, has been remanded to and is presently pending in the District Court).

The Petition misstates the procedural history and current status of this case by omitting the following facts:

1. The Fifth Circuit's mandate (returning this case to the District Court) was issued on July 6, 1998;

2. "Appellees' [TEA's] Motion to Recall Mandate" was denied by "Order" of the Fifth Circuit filed July 13, 1998;

3. "Defendants' [TEA's] Motion to Stay Proceeding Pending Certiorari" filed in the District Court on July 17, 1998, was denied by "Order" of the District Court signed September 16, 1998; and

4. "[TEA's] Motion to Reconsider Stay of Proceeding Pending Petition for Certiorari" was filed in the District Court on September 26, 1998, and was granted by "Order" signed by the District Court on October 14, 1998.

In point of fact, the Fifth Circuit's mandate has been issued and this case has been remanded to, and is presently pending in, the District Court. This case is not in the Fifth Circuit. The petition's misstatement (by omission) of the status of this case is particularly important where, as here, the sole basis for invoking this Court's jurisdiction is 28 U.S.C. § 1254(1). Petition, p. 2. The aforesaid 28 U.S.C. § 1254(1) reads as follows:

> Cases *in the courts of appeals* may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

(Emphasis added).

This is a case now pending in the District Court. This is not a case ". . . in the courts of appeals . . ." subject to review by writ of certiorari under 28 U.S.C. § 1254(1).

B. The petition misstates the constitutional provisions, statutes, and regulations involved in this case.

Sup. Ct. R. 14 ("Content of a Petition for a Writ of Certiorari") reads, in pertinent part, as follows:

> 1. A petition for a writ of certiorari shall contain in the order indicated: . . . (f) the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

At pages 2 and 3 of the petition (under the heading "CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED"), TEA purports to comply with the above quoted provision of Sup. Ct. R. 14. However, the petition fails to comply with the above quoted section 1(f) of Sup. Ct. R. 14 and misstates the constitutional provisions, statutes, and regulations involved in this case.

For example, this case clearly involves Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §§ 2000e-

2000e-17; 42 U.S.C. § 1981(a) (hereafter referred to collectively as "Title VII"). However, the petition refers only to two (2) provisions of Title VII: 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e-12(b). To make matters worse, the petition misstates 42 U.S.C. § 2000e-2(a) by quoting only the language of subsection (1) while wholly ignoring the clearly applicable language of subsection (2).

Under 42 U.S.C. § 2000e-2(a)(2):

> It shall be an unlawful employment practice for an employer — . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individuals race, color, religion, sex, or national origin.

This clearly applies to the TEA's unlawful classification of Messer as both an over-utilized race (white) and an over-utilized gender (female).

The petition fails to make any mention whatsoever of 42 U.S.C. § 2000e-2(j), which is directly applicable to this case, and which reads as follows:

> (j) Preferential treatment not to be granted on account of existing number or percentage imbalance
>
> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter

> to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons or any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, *in comparison with the total number or percentage of persons of such race, color, religion, sex, or national original in any* community, *State*, section, or other area, *or in the available work force in any* community, *State*, section, or other area.

(Emphasis added).

In the present case, TEA, by means of the TEA Affirmative Action Plans ("AAPs"), hiring guidelines, and under-utilization notices, gave preferential treatment to TEA employees and prospective employees on the basis of race and gender on "account of an imbalance" perceived by the TEA (at the prodding of the State Board of Education) ". . .in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin. . ." in the state of Texas. Such conduct is *not* condoned by any interpretation of Title VII. 42 U.S.C. § 2000e-2(j).

The petition further violates § 1(f) of Sup. Ct. R. 14 by failing to refer to 42 U.S.C. § 2000e-2(m). 42 U.S.C. § 2000e-2(m) is clearly applicable to the TEA employment practices at issue and states:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, *even though other factors also motivated the practice.*

(Emphasis added).

Similarly, the petition relies upon certain U.S. Department of Labor regulations requiring federal contractors to have affirmative action plans (petition, p. 4) in support of TEA's so-called "safe harbor" defense under Title VII. However, the petition omits any reference to the very part of those regulations that pertains to the TEA AAPs. More particularly, the petition wholly fails to make any reference whatsoever to 41 C.F.R. § 60-2.12 ("Establishment of Goals and Timetables.") which reads, in pertinent part, at subsection (g): "Goals, timetables, and affirmative action commitments must be designed *to correct any identifiable deficiencies.*" (Emphasis added). *See also* 41 C.F.R. § 60-2.12(h) which reads:

> *Where deficiencies exist* and where percentages are relevant in developing corrective action the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(Emphasis added).

The petition purportedly relies upon EEOC regulations pertaining to affirmative action plans. However, the petition

pointedly fails to make any reference whatsoever to 29 C.F.R. § 1608.4. The introductory paragraph of 29 C.F.R. § 1608.4 states:

> An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

The petition ignores the aforesaid three (3) elements necessary in any affirmative action plan. The petition also fails to mention the very EEOC regulation (29 C.F.R. § 1608.4(b)) which defines what is, in fact, a "reasonable basis" for concluding affirmative action appropriate. 29 C.F.R. § 1608.4(b).

The TEA AAPs, on their face, violate the very EEOC regulations which the petition fails to mention. See for example, 29 C.F.R. § 1608.4(c)(2) ("Standards of reasonable action.").

The key discriminatory provisions of the TEA AAPs were adopted by the TEA in direct response to the State Board of Education's goal of having TEA employees "mirror" the race and gender of the population of the state of Texas as a whole. It is disingenuous for TEA to argue that the TEA AAPs were developed to comply with EEOC regulations or other federal regulations.

The petition spends considerable effort (see petition, pp. 14-17) attempting to explain why the racial classifications in the TEA AAPs should not be judged under the "strict scrutiny" demanded by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); and *Hopwood v. State of Tex.*, 78 F.3d

932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996). In fact, the very EEOC regulations ignored in the petition essentially mirror the "strict scrutiny" test. For example, they dictate that: "The race, sex and national origin conscious provisions of the [affirmative action] plan or program should be maintained only so long as is necessary to achieve these objectives" and that "goals and timetables should be reasonably related to such considerations as the effects of past discrimination, . . .". 29 C.F.R. § 1608.4(c)(2). *See also* 29 C.F.R. §§ 1608.4(b) and 1608.4(c)(2).

C. The petition misstates the facts.

The "Statement of the Case" set forth at pages 3-6 of the petition misstates the facts (*i.e.*, the summary judgment evidence before the Fifth Circuit). The petition's misstatement of the facts is abundantly clear when the petition's "Statement of the Case" is compared with the detailed recitation of facts painstakenly set out by the Fifth Circuit in its opinion. *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997); App. A, a1-a24.

Compare, for example, the misstatement of the TEA's Affirmative Action Plans ("AAPs") in the first full paragraph at page 4 of the petition with the accurate statement of the TEA's AAPs set forth by the Fifth Circuit. *See Messer v. Meno*, 130 F.3d at 133 and 137-39; App. A, a3; a13-a17. Also, compare the misstatement of the "TEA AAP 'Under-utilization Notices' " (*see Messer v. Meno*, 130 F.3d at 138-39) (incompletely referred to in the petition simply as "utilization notices") in the second paragraph at page 4 of the petition with the correct statement of the "TEA AAP 'Under-utilization Notices' " stated by the Fifth Circuit. *Messer v. Meno*, 130 F.3d at 138-39; App. A, a14-a16.

The Fifth Circuit specifically found that Messer's assertion ". . . that TEA systematically promoted employees based on

racial and gender criteria found in the utilization reports" was ". . . supported for summary judgment purposes with adequate evidence. . .". *Messer v. Meno*, 130 F.3d at 135; App. A, p. a8.

The Fifth Circuit noted:

> The magistrate judge also observed that not only were the AAPs implemented at TEA not designed to correct past discrimination, but there was presently no manifest racial or sexual imbalance.

Messer v. Meno, 130 F.3d at 136; App. A, a10. The Fifth Circuit further noted that ". . . both the scope of the AAP's and their impact on Messer's employment are subject to genuine dispute." *See Messer v. Meno*, 130 F.3d at 137; App. A, a10-a11.

The Fifth Circuit noted that the language of the TEA AAPs themselves and the U.S. census statistics cited therein ". . . obviously raises concern that the AAP on its face mandates an unconstitutional quota system." *Messer v. Meno*, 130 F.3d at 137, n.4; App. A, a11-a12, n.4. The Fifth Circuit further noted that Messer had presented evidence ". . .that the AAP was vigorously enforced to insure that TEA's workforce would resemble as closely as possible the state's racial and gender breakdown." *Messer v. Meno*, 130 F.3d at 137; App A, a13.

After citing detailed summary judgment evidence submitted by Messer, the Fifth Circuit concluded:

> Such evidence, if uncontradicted, strongly suggests recruitment was not the sole activity affected by the AAP, and that once an applicant met the minimum requirements for a position, TEA employees considered race or gender in employment decisions.

Messer v. Meno, 130 F.3d at 139; App. A, a16.

After detailing the summary judgment evidence which TEA either ignores or misstates or mischaracterizes (Petition, pp. 3-6), the Fifth Circuit concludes:

> TEA's response to this evidence, apart from creating a fact issue on the precise application of the AAPs in employment decisions, is that even if there were some incidents of past discrimination, these were isolated anomalies and cannot be related to the individual harm of which Messer complains. The abundant evidence of underutilization notices, statements regarding affirmative action and minority hiring from the division of Personnel and Staff Development, handwritten notes with TEA letterhead regarding the "parity" of various groups in hiring decisions, and correspondence from Commissioner Meno stating that TEA "continues to implement the goal of the State Board of Education to achieve a staff balanced both in ethnicity and gender and reflecting as nearly as possible the ethnic composition of the state as a whole", appear to depict an agency-wide consciousness of race and gender as grounds for employment decisions. *At the very least, Messer has raised a material factual issue regarding whether she was discriminated against as a result of TEA's AAP in the specific instances of which she complains.* The magistrate judge erred in finding that Messer failed to produce "any facts" that would show TEA's explanations for its personnel decisions.

See Messer v. Meno, 130 F.3d at 139; App. A, a17. (Emphasis added).

D. The petition misstates the Fifth Circuit's opinion.

The petition misstates the Fifth Circuit's opinion in a tortured attempt to convince this Court that the Fifth Circuit's opinion "... has dramatically changed the landscape in employment discrimination cases from what had previously appeared to exist." Petition, p. 7.

Among the more egregious misstatements of the Fifth Circuit's opinion (which misstatements are made without citation to the Fifth Circuit's opinion) are the following:

> The Fifth Circuit's reasoning creates an *irrebutable presumption* of discrimination based on the *existence* of an affirmative action plan *alone* and thereby imposes on non-minority plaintiffs complaining of "reverse" discrimination a *lighter burden* than is placed on minority plaintiffs under Title VII.

Petition, p. 8. (emphasis added).

> ... [T]he majority opinion treats the *existence* of the affirmative action plan as raising an *irrebuttable presumption* of discrimination against non-minorities, sufficient to *automatically refute* TEA's legitimate, non-discriminatory reasons and preclude summary judgment for TEA.

Petition, p. 8. (emphasis added).

> By its decision in Messer's case, the Fifth Circuit has created a *lighter standard* for non-minority plaintiffs to show pretext. Only by treating the *existence* of an affirmative action plan as giving rise

> to an *irrebuttable presumption* of discrimination could the majority *completely ignore* four uncontroverted facts: . . . .

Petition, p. 9. (emphasis added).

> The Fifth Circuit's ruling rests upon an *assumed connection* between an affirmative action plan and discrimination that does not necessarily (and in this case does not in fact) exist . . . For the majority, it was enough that Messer had evidence of affirmative action in the hiring of *other* employees.

Petition, p. 13. (emphasis added).

By making misstatements such as those quoted above, TEA would have this Court believe that the Fifth Circuit has opined, in essence, as follows: "TEA has an affirmative action plan of some kind; accordingly, it is irrebuttably presumed that Messer was discriminated against." The Fifth Circuit clearly rendered no such opinion. TEA's repeated misstatements to the effect that it did underscore the weakness of TEA's position.

Rather than attacking the opinion of the Fifth Circuit, TEA has instead elected to misstate and mischaracterize that opinion until it is unrecognizable. TEA seeks to elicit the interest of this Court by disingenuously transforming the Fifth Circuit's opinion into a "parody" of itself.

E. The petition simply ignores the undisputed findings of the District Court which support the Fifth Circuit's opinion.

TEA filed no cross-appeal of any portion of the District Court's opinion. *Messer v. Meno*, 936 F. Supp. 1280 (W.D. Tex. 1996); App. C.

The petition simply ignores the following undisputed factual findings by the District Court which support the Fifth Circuit's opinion:

> 1. From the evidence submitted by Plaintiff, it is clear that an extensive amount of work was done over the years to create, maintain, and analyze documentation concerning the ethnic and gender makeup of TEA employees and applicants for employment.

Messer v. Meno, 936 F. Supp. at 1286; App. C, a31.

> 2. In furtherance of his commitment to affirmative action, Commissioner Meno hired four new senior directors (who are all minorities) at salaried higher than the salary then paid to Plaintiff as a senior director.

Messer v. Meno, 936 F. Supp. at 1286; App. C, a31.

> 3. There is substantial evidence indicating that affirmative action was, at least in part, a factor not only in recruitment but also in TEA hiring decisions.

Messer v. Meno, 936 F. Supp. at 1286; App. C. a31.

> 4. The Court notes that the evidence indicates that the AAPs in the present case were not designed to correct past discrimination, [FN 18] nor is there at present a manifest racial or sexual imbalance.

Messer v. Meno, 936 F. Supp. at 1293; App. C, a49.

> 5. Given that affirmative action has succeeded at this agency, the court surmises that, under *Hopwood* and using strict scrutiny, any future use of race or gender as a factor in an actual hiring decision would be unconstitutional.

Messer v. Meno, 936 F. Supp. at 1293-94; App. C, a50, n.19.

> 6. The court notes, however, that TEA's use of "utilization reports" is arguably coercive with respect to hiring decisions and, as such, implicates *Hopwood's* prohibitions. While the court does not reach this issue, the court is disturbed at the continued use of utilization reports may create gender or racial preferences in hiring decisions, which is clearly impermissible under Supreme Court precedent and under *Hopwood*.

Messer v. Meno, 936 F. Supp. at 1294, n.19; App. C, a50.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for the following reasons:

1. In accordance with the mandate of the Fifth Circuit, this case has been remanded to and is presently pending in the District Court. Accordingly, this is not a case ". . . in the courts of appeals . . ." subject to review by writ of certiorari under 28 U.S.C. § 1254(1) (*see* petition p. 2) and this Court has no jurisdiction to grant the writ. *See* foregoing part A.

2. The petition fails to comply with § 1(f) of Sup. Ct. R. 14 ("Content of the Petition for a Writ of Certiorari") because the petition misstates (by omission) ". . . the constitutional

provisions, treaties, statutes, ordinances, and regulations involved in the case, . . .". *See* foregoing part B.

3. The petition misstates the facts. *See* foregoing part C.

4. The petition misstates the Fifth Circuit's opinion. *See* foregoing part D.

5. The petition ignores the undisputed findings of the District Court which support the Fifth Circuit's opinion. *See* foregoing part E.

6. The Fifth Circuit expressly applied the evidentiary standard established by this Court in *St. Mary's Honor Center v. Hicks* in weighing the summary judgment evidence before it (*Messer v. Meno*, 130 F.3d at 137; App. A, a12) and TEA is disingenuous to assert otherwise. Petition pp. i; 7-10.

7. The Fifth Circuit did not treat the TEA AAP

> . . . as creating an irrebuttable presumption of discrimination and thereby imposing on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs under Title VII.

(Petition p. 7) and TEA's assertion that it did is a gross mischaracterization of the Fifth Circuit's opinion. The Fifth Circuit merely found that Messer's summary judgment evidence raised a "fact issue" (not an "irrebuttable presumption") that discrimination had, in fact, occurred. *Messer v. Meno*, 130 F.3d at 133; App. A, a2. *See* following part F.

8. TEA waived its right to assert that "The Fifth Circuit departed from the decisions of this Court in congressional intent

by evaluating a public employer's affirmative action plan under constitutional equal protection standards in a Title VII case" (petition p. 14) because TEA *cited* and *relied upon* the "constitutional equal protection standards" established by this Court in *Adarand*, *Croson*, and *Wygant* as the "Applicable legal standard" before the Fifth Circuit in Appellees' Brief pp. 26-28. *See* following part G.

9. The Fifth Circuit has not "departed from the decisions of this Court" as TEA asserts (petition p. 14) but has, instead, clearly relied upon the opinions of this Court in *Adarand*, *Croson*, and *Wygant*. *See* following part H.

10. The question asserted by TEA is not "important" (petition, pp. 17-18) because, whether one follows the "equal protection standards for affirmative action" set forth by this Court in *Adarand*, *Croson*, and *Wygant*, or whether one follows the Title VII standards for affirmative action set forth by this Court in *Weber* and *Johnson*, the TEA AAP flunks both tests. See following part I.

The petition states three (3) reasons for granting the petition. Petition, pp. 7, 14, and 17.

The first stated reason for granting the petition is as follows:

> I. The Fifth Circuit's decision conflicts sharply with the standards enunciated by this Court by treating an affirmative action plan as creating an irrebuttable presumption of discrimination and thereby imposing on non-minority plaintiffs complaining of 'reverse' discrimination a lighter burden than is place on minority plaintiffs under Title VII.

Petition, p. 7.

F. The Fifth Circuit did not treat the TEA AAP "as creating an irrebuttable presumption of discrimination."

TEA's assertion that the Fifth Circuit treated the TEA AAP "as creating an irrebuttable presumption of discrimination" thereby placing "a lighter burden" on non-minority plaintiffs than on minority plaintiffs under Title VII constitutes a gross mischaracterization of the Fifth Circuit's opinion and is wholly unsupported by the evidence. If, as asserted by TEA, the Fifth Circuit treated the TEA AAP "as creating an irrebuttable presumption of discrimination" then why did the Fifth Circuit remand the case to the District Court for the trier of fact to determine the "disputed facts"? Nowhere in its opinion does the Fifth Circuit conclude or hold that the existence of the TEA AAP creates "an irrebuttable presumption of discrimination". The Fifth Circuit merely found that Messer's summary judgment evidence raised a "fact issue" (not an "irrebuttable presumption") that discrimination had, in fact, occurred. *Messer v. Meno*, 130 F.3d at 133; App. A, a2. ("*We find genuine issues of material fact*; TEA's favorable summary judgment is, for the most part, reversed and the case remanded.") (Emphasis added).

TEA's assertion that the Fifth Circuit's opinion imposed a "lighter burden" upon "non-minority plaintiffs" than upon "minority plaintiffs" under Title VII also mischaracterizes the Fifth Circuit's opinion and is not supported by the summary judgment evidence. More particularly, the summary judgment evidence establishes that, during the particular time at issue in this case, Messer was both an "over-utilized" race (white) as well as an "over-utilized" gender (female). However, either the vagaries of the decennial census or the specific gender/racial makeup of the particular TEA division making the hiring or promotion decision, can result in the "over-utilized" gender being male and the "over-utilized" race being Hispanic or Black.

The Fifth Circuit cites nine (9) portions of the record as being "among" the "many portions of the record [cited by Messer] to substantiate the discriminatory impact of TEA's affirmative action policy." *Messer v. Meno*, 130 F.3d at 137; App. A, a13. Only the first of these nine (9) pieces of evidence consists of the TEA AAPs. *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16. Among the additional evidence cited by the Fifth Circuit are TEA reports, letters, recruitment and hiring guidelines, "under-utilization notices", handwritten notes, etc. *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16.

The Firth Circuit's opinion does not purport to cite all of the summary judgment evidence in support of Messer's position. However, the evidence cited refutes the allegations asserted by TEA in the petition.

It is equally clear that the Fifth Circuit used the appropriate evidentiary test (*i.e.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)) in weighing the summary judgment evidence before it. *Messer v. Meno*, 130 F.3d at 137; App. A, a12. TEA is disingenuous to assert otherwise. Petition, pp. 7-10.

Can TEA obtain a writ of certiorari by asserting that the Fifth Circuit erred by applying the very evidentiary test (*St. Mary's Honor Center v. Hicks*, *supra*) which TEA had asked the Fifth Circuit to apply to the facts of this case? Common sense dictates the answer: No.

The second stated reason for granting the writ is as follows:

> II. The Fifth Circuit departed from the decisions of this Court and congressional intent by evaluating a public employer's affirmative action plan under

> constitutional equal protection standards in a Title VII case.

Petition, p. 14.

G. TEA's position is contrary to the position taken by TEA before the Fifth Circuit.

In its brief filed in the Fifth Circuit, TEA pointedly did *not* assert that the District Court erred in subjecting the TEA AAPs to the "close scrutiny" mandated by this Court in *Adarand*, *Croson*, and *Wygant*. In fact, TEA *cited* and *relied upon* *Adarand*, *Croson*, and *Wygant* as the "Applicable legal standard" before the Fifth Circuit. Brief of Appellees ("Appellees' Brief"), pp. 26-28. Although discussed under a separate subheading ("*Hopwood v. State of Texas*") of Appellees' Brief (at pp. 28-29), it is clear that TEA considered *Hopwood* to be part of the "Applicable legal standard" in this case. Appellees' Brief, pp. 26-33.

After acknowledging that *Adarand*, *Croson*, and *Wygant*, and also *Hopwood*, are the "Applicable legal standard" in this case (Appellees' Brief, pp. 26-31), TEA asserted compliance with that "Applicable legal standard" in a section of Appellees' Brief entitled "Compliance with *Croson/Adarand/Hopwood*." Appellees' Brief, pp. 31-33.

TEA is now asserting:

> The Fifth Circuit departed from the decisions of this Court and congressional intent by evaluating a public employer's affirmative action plan under constitutional equal protection standards in a Title VII case.

Petition, p. 14. However, *prior* to entry of the Fifth Circuit's opinion, TEA acknowledged and judicially admitted in its brief filed in the Fifth Circuit that *Adarand*, *Croson*, *Wygant*, and *Hopwood* were the "Applicable legal standard" by which the TEA AAPs must be judged. Appellees' Brief, pp. 26-31. *Prior* to the Fifth Circuit's opinion, TEA asserted "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31) which TEA candidly acknowledged was the "Applicable legal standard" (Appellees' Brief, p. 26).

The Fifth Circuit properly applied the "Applicable legal standard" which TEA insisted be applied to this Title VII case. Appellees' Brief, pp. 26-31. In doing so, the Fifth Circuit correctly determined that the summary judgment evidence raised fact issues which preluded the judicial finding of "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31) sought by TEA.

The Fifth Circuit's opinion provided a detailed analysis of merely a portion of the "many portions of the record" which substantiated "the discriminatory impact of the TEA's affirmative action policy." *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16. It is clear from the Fifth Circuit's extensive review of only a portion of the summary judgment evidence that the TEA AAP was certainly *not* in "Compliance with *Croson/Adarand/Hopwood*" which TEA had acknowledged was the "Applicable legal standard."

Faced with a detailed and well-reasoned Fifth Circuit opinion, TEA has taken a bold and unprecedented step before this Court. TEA has burdened this Court with a petition for writ of certiorari in which TEA asserts that the Fifth Circuit *erred* by applying the very "Applicable legal standard" (*i.e.*, "Compliance with *Croson/Adarand/Hopwood*") which TEA had *told* the Fifth Circuit to apply. Appellees' Brief, pp. 26-33.

TEA has filed an ill-advised petition based largely (and improperly) upon issues never raised by TEA before the Fifth Circuit rendered its opinion and, in fact, directly *contrary* to the position taken by TEA before the opinion now complained of was entered. As stated by the Fifth Circuit:

> We have held repeatedly that we will not consider issues not briefed by the parties. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 257 n.2 (5th Cir. 1996) ("an appellant abandons all issues not raised and argued in its initial brief on appeal.") (quoting *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 739 n.9 (5th Cir. 1993) (failure to sufficiently brief issue constitutes waiver of issue).

Johnson v. Sawyer, 120 F.3d 1307, 1315-16 (5th Cir. 1997).

TEA has clearly *waived* its right to complain of the Fifth Circuit's application of a legal standard which TEA acknowledged before that Court was the "Applicable legal standard."

H. The Fifth Circuit has not "departed from the decisions of this Court" as TEA asserts.

In writing the majority opinion for the Fifth Circuit, Circuit Judge Jones clearly relied upon the following three (3) key opinions of this Court: *Adarand Constructions, Inc. v. Pena* ("*Adarand*"), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *City of Richmond v. J.A. Croson Co.* ("*Croson*"), 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); and *Wygant v. Jackson Bd. of Educ.* ("*Wygant*"), 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). *Messer v. Meno*, 130 F.3d at 135-36; App. A, a9-a10. In his specially concurring opinion,

Circuit Judge Garza concurred with the result reached by the majority and acknowledged: "The majority appropriately cites *Wygant*, *Croson*, and *Adarand* as the three (3) leading Supreme Court cases on this subject. [citations omitted]." *Messer v. Meno*, 130 F.3d at 141; App. A, a20-a21. Judge Garza also refers to "[T]he Supreme Court's limitations on affirmative action, as exemplified in *Wygant*, *Croson*, and *Adarand*." *Messer v. Meno*, 130 F.3d at 142; App. A, a23. The Fifth Circuit also cited *Adarand*, *Croson*, and *Wygant* when it held, in *Hopwood*:

> Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial".

Hopwood v. State of Tex. ("*Hopwood*"), 78 F.3d 932, 940 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

The Fifth Circuit's opinions in both *Hopwood* and below rested squarely on the shoulders of this Court's opinions in *Adarand*, *Croson*, and *Wygant*. In both *Hopwood* and the opinion below, the Fifth Circuit correctly held that the "strict scrutiny" test set forth in *Adarand*, *Croson*, and *Wygant* clearly applied to the affirmative action plans (AAPs) at both the University of Texas School of Law and the TEA. Although citing *Hopwood* in addition to *Adarand*, *Croson*, and *Wygant*, the Fifth Circuit clearly relied not upon *Hopwood* but upon the authority of this Court set forth in *Adarand*, *Croson*, and *Wygant*.

The Fifth Circuit's reliance upon Supreme Court precedent (rather than *Hopwood*) is illustrated by the following portion of the specially concurring opinion of Circuit Judge Garza:

> During the course of our deliberations, I asked my fellow judges on this panel to wait until the Supreme Court made its decision in *Piscataway* before publishing an opinion in this case. *Taxman v. Bd. of Educ. of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), cert. granted __ U.S. __, 117 S. Ct. 2506, 138 L. Ed. 2d 1010 (1997). My colleagues chose not to do so, and I disagreed with this choice.

Messer v. Meno, 130 F.3d at 141; App. A, a21.

The third stated reason for granting the writ is as follows:

> "III. The question presented is important." Petition, p. 17.

I. The question presented is not "important" as asserted by TEA.

At pages 17 and 18 of the petition, TEA asserts, in pertinent part: "Whether Title VII incorporated equal protection standards for affirmative action is a matter of more than academic importance to state agency employers."

As noted previously, the TEA itself, in its brief before the Fifth Circuit, acknowledged and asserted that the "equal protection standards for affirmative action" (*i.e.*, those standards set by this Court in *Adarand*, *Croson*, and *Wygant* and applied by the Fifth Circuit in *Hopwood*) constituted the "Applicable legal standard" (Appellees' Brief, p. 26). TEA also expressly asserted "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31).

As noted earlier, TEA has clearly waived any right to argue against the incorporation of those very "equal protection

standards for affirmative action" which the TEA argued in its brief before the Fifth Circuit were applicable and which standards the TEA likewise argued in its brief before the Fifth Circuit the TEA AAPs met. Where, as here, an issue has been waived as a matter of law, it clearly cannot be deemed "important."

EEOC regulations have essentially adopted the "equal protection standards for affirmative action" set forth so clearly by this Court in *Adarand*, *Croson*, and *Wygant* and followed by the Fifth Circuit in *Hopwood*. See for example, 41 C.F.R. § 60-2.12 and 29 C.F.R. § 1608.4. As noted earlier, these clearly applicable EEOC regulations were ignored by TEA in the petition. In point of fact, the TEA AAP not only violates "equal protection standards for affirmative action," it also clearly violates Title VII itself (*e.g.*, 42 U.S.C. § 2000e-2(a)(1) and (2) and 42 U.S.C. § 2000e-2(j)) as well as applicable EEOC regulations specifically pertaining to affirmative action plans (*e.g.*, 41 C.F.R. § 60-2.12 and 29 C.F.R. § 1608.4).

The TEA AAP clearly violates the Title VII standards for affirmative action set forth by this Court in *Johnson v. Transportation Agency*, 480 U.S. 616, 637, 640, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) (where, unlike the TEA AAP, this Court reviewed ". . .an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories." and then found that ". . .there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance."); and *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979) (where, unlike the TEA AAP, "[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.").

In *Johnson v. Transportation Agency*, *supra* at 632, Justice Brennan noted: "[W]e do not regard as *identical* the constraints

of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." (Emphasis added). However, a comparison of the constitutional constraints set forth in *Adarand*, *Croson*, and *Wygant* with the Title VII constraints set forth in *Johnson* and *Weber* shows them to be, if not "identical", at least substantially the same.

As stated by Justice O'Connor (concurring in the judgment) in *Johnson*, *supra* at 649:

> In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required.

Justice O'Connor concludes:

> Because both Wygant and Weber attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.

Johnson, *supra* at 651.

In any event, the TEA AAP flunks both the constitutional (*Adarand*, *Croson*, and *Wygant*) test and the Title VII (*Weber* and *Johnson*) test for affirmative action plans. See for example, the following undisputed factual findings of the District Court:

> The Court notes that the evidence indicates that the AAPs in the present case were not designed to correct past discrimination, [FN 18] nor is there at present a manifest racial or sexual imbalance.

Messer v. Meno, 936 F. Supp. at 1293, App. C, a49.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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